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In The

Supreme Court of the United States

October Term, 1992

ROSS MIDDLEMIST, WAYNE W. MAUGHAN, FLATHEAD JOINT BOARD OF CONTROL,

Petitioners,

vs.

SECRETARY OF THE UNITED STATES DEPARTMENT OF INTERIOR, Bruce Babbitt; DIRECTOR OF THE BUREAU OF INDIAN AFFAIRS, PORTLAND AREA, Stanley M. Speaks; SUPERINTENDENT OF THE BIA FLATHEAD AGENCY, Ernest Moran, in their official capacities; MEMBERS OF THE TRIBAL COUNCIL OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, Michael Pablo, Sonny Morigeau, Louis Adams, Hank Baylor, Fred Matt, Tony Incashola, John Lozeau, Lloyd Irvine, Patrick Lefthand, Laurence Kenmille; DIRECTOR OF THE DEPARTMENT OF NATURAL RESOURCES OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, Rhonda R. Swaney; ADMINISTRATOR OF THE SHORELINE PROTECTION OFFICE OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, J. Lloyd Jackson; MEMBERS OF THE SHORELINE PROTECTION BOARD OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, Joseph Schneider, Gem Mercer, Al Hewankorn, Donald Lucas, Thurman Trosper, Henry Normandeau,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do the rights and protections afforded all citizens by the Constitution and the decisions of this Court bar the exercise of an Indian tribal government's authority, including a requirement to exhaust tribal administrative and judicial remedies, to regulate farming and ranching by nonmembers, who have no rights of political participation in tribal government, on land they own in fee within an open reservation and from which they cannot be excluded?

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Ross Middlemist, Wayne Maughan, and the Flathead Joint Board of Control (hereinafter collectively referred to as "Middlemist"), respectfully request this Court, pursuant to 28 U.S.C. § 2101(e) and Sup. Ct. R. 11, to issue a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review the Order entered in this matter on February 12, 1993, by the United States District Court for the District of Montana, Missoula Division, and appealed to the Court of Appeals March 9, 1993, which docketed the appeal April 2, 1993, as No. 93-35315.

OPINION BELOW

The Opinion and Order of the U.S. District Court which Middlemist asks this Court to review has not been reported and is printed in the Appendix to this Petition at A-1 through A-15.

JURISDICTION

The U.S. District Court entered its Order February 12, 1993. Its jurisdiction rested on 28 U.S.C. § 1331 and 28 U.S.C. § 1361. Middlemist filed a Notice of Appeal to the Ninth Circuit Court of Appeals March 9, 1993. The Court of Appeals docketed the appeal, No. 93-35315, April 2, 1993. The jurisdiction of the Court of Appeals rests on 28 U.S.C. § 1291. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional provisions, Treaty, statutes, ordinance, and regulations, relevant portions of which are set out verbatim in the Appendix:

> Constitution of the United States of America, Article IV, § 2 and § 4, Amendment V, Amendment VII, Amendment IX, Amendment X, Amendment XV (A-46-47);
>
> Treaty of Hellgate, July 16, 1855 (A-48-49);
>
> Flathead Allotment Act, Act of April 23, 1904 (33 Stat. 302) (A-50-51);
>
> Confederated Salish and Kootenai Tribes' Ordinance 87A, Aquatic Lands Conservation Ordinance (A-38-40);
>
> Ordinance 87A Regulations (A-41-44);
>
> Declaratory Judgment Act, 28 U.S.C. 2201-2202 (A-52).

STATEMENT OF THE CASE

1. Introduction.

This case concerns the assertion of power by a tribal government to regulate and punish land use by people who are not tribal members on land they own in fee, contrary to the well-established general rule laid down by this Court in *Montana v. United States*, 450 U.S. 544, 565 (1981) and consistently reaffirmed since. *Cf. Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492

U.S. 408 (1989); *Duro v. Reina*, 495 U.S. 676 (1990).[1] It concerns the assertion of authority by a government which does not allow nonmembers, including Middlemist, to vote in elections, hold office, or sit on a jury or as a judge. It concerns the threat of enforcement action, including unpermitted and warrantless searches and destruction and removal of property, for failure to submit to the authority of a government which is not limited by either the Constitutional rights of nonmembers, including the Bill of Rights, *Talton v. Mayes*, 163 U.S. 376 (1896), or the Constitutional restraints on State and Federal action. *Santa Clara Pueblo v. Martinez*, 436 U.S. 39, 57 (1978).

Ultimately, this case concerns whether the fundamental understanding of citizens that they have the inalienable right to political participation in the governments under which they must live also applies to those who through congressional policies have come to live and own property on reservations but are not tribal members and

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[1] The issue of tribal jurisdiction over nonmembers engaged in activity on non-tribal fee land raised by *Middlemist* is similar to the issues now before this Court in *State of South Dakota v. Bourland*, No. 91-2051, October Term, 1992 (argued March 2, 1993). The difference between these cases is that in *Bourland* the geographic area in which tribal jurisdiction over nonmembers is at issue is fee land owned by the federal government. In *Middlemist*, the fee land at issue is owned by individuals who are not tribal members. Should the Court decide to establish principles of tribal jurisdiction applicable throughout the country and ground its decision of these issues on either the constitutional principles or the limits of tribal jurisdiction over nonmembers established in its decisions, it would be appropriate for the Court to review and decide *Middlemist* as well as *Bourland*.

are therefore excluded from participation in tribal government.[2] Middlemist does not contest the legitimacy of tribal sovereignty or tribal authority over those who are members and have consented to tribal government. Nor does Middlemist contest tribal sovereignty over land owned by the Tribe or held in trust for it. But Middlemist strenuously disputes the legitimacy of tribal assertions of authority over nonmember activity on fee land as contrary to the fundamental basis of our constitutional system.

The salient facts presented by the Petitioners, Ross Middlemist, Wayne Maughan, and the Flathead Joint Board of Control (JBC)[3], are simple, paradigmatic and common, arising frequently on reservations Congress opened to nonmember settlement and which now contain populations with a high percentage of nonmembers and significant agricultural areas owned by nonmembers: The individual landowners are not members of the resident

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[2] The Tribes involved in this matter are the Confederated Salish and Kootenai Tribes ("CSKT") of the Flathead Reservation, located in northwestern Montana.

[3] The JBC is a local governmental entity formed under the statutes of Montana to act as a central operating authority for the three Irrigation Districts which comprise it. (§§ 85-7-1601, et seq., Mont. Code Ann.) The Montana statutes pertaining to irrigation districts are found at Title 85, Chapter 7, Parts 1-22, Mont. Code Ann. These Irrigation Districts were formed, at the specific direction of Congress, under state law to represent the owners of fee land. Act of May 10, 1926 (44 Stat. 453, 464). Included in the 70-odd statutes enacted by Congress specifically addressing this irrigation project is a provision, in the authorizing Act of May 29, 1908 (35 Stat. 448), requiring the transfer of the operation and management of the irrigation project to the landowners it serves. These landowners, tribal members and nonmembers, are now represented, at the insistence of Congress, by state-chartered Irrigation Districts, which are local governmental entities under state law.

Tribes (Complaint, paragraphs 1, 4, 6; A-18)[4]; they own their land in fee and acquired it pursuant to the allotment laws of the United States (C-1, 11, 19, 20; A-22, 23)[5]; their land is situated in an "open," completely agricultural area of the reservation (C-47-70; A-28-31); they cannot be excluded from their land (C-65, 66, 68, 69; A-31); they wish to undertake on their land small projects common in the course of farming and ranching (C-12, 13, 23, 24, 25; A-22, 24); the tribal government claims to have jurisdiction to regulate their land use and to enforce compliance by unpermitted access to private land for inspections, by issuing compliance and removal orders, by levying fines of up to $500.00 per day, and by removing projects, at the landowner's expense, not voluntarily brought into compliance. (C1, 34, 41-46; A-19, 26, 27-28; A-38-44).

Notwithstanding the clear violation of the limits of tribal jurisdiction presented by the CSKT government's

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[4] The Complaint is in the Appendix at A-17 to A-37. When referencing the Complaint, Petitioners provide citations to specific paragraphs in the Complaint as "C-___" and the Appendix. Under the standards applicable to motions to dismiss, Rule 12(b)(6), Fed.R.Civ.Pro., the well-pleaded factual allegations of the Complaint are taken as true. *Conley v. Gibson*, 355 U.S. 41 (1957); *Brower v. County of Inyo*, 489 U.S. 593 (1989) (reversing decision upholding grant of motion to dismiss in civil rights action.)

[5] General Allotment Act, 25 U.S.C. § 331, et seq., and Flathead Allotment Act (Act of April 23, 1904, 33 Stat. 302). As a result of these acts nonmembers now own in fee (according to CSKT tribal government statistics) 490,120 acres of the 1.2 million acre Reservation; and of the Reservation population of 21,259, 3,000, or 14 percent, are tribal members. (C-60; A-30.)

assertion of authority here, the court below abstained from exercising its jurisdiction to vindicate Middlemist's rights, instead requiring exhaustion of all tribal remedies, administrative and judicial, even though there are no tribal proceedings ongoing. Because of the clear conflict between the tribal assertion of jurisdiction and the lower court's decision on the one hand and the Constitutional and decisional limits on tribal jurisdiction on the other, and in view of the fundamental nature of the rights at stake and the wide-spread importance of this issue which affects nearly 400,000 individuals living on reservations nationwide, Middlemist has requested review before judgment in the Court of Appeals. Without this Court's review, Middlemist's meritorious request for federal declaratory and injunctive relief from this groundless assertion of tribal authority will be enmeshed in years of tribal, and perhaps federal, proceedings. Without doubt, this will chill and perhaps freeze Middlemist's fundamental right to make use of their property, which is subject to federal and state regulation. (C-14, 15, 29; A-22, 25.)

2. Facts

Ross Middlemist, a third-generation rancher on the Flathead Reservation, residing in Sanders County, Montana, must replace a dilapidated stock water tank fed by a small natural spring which arises on his own property and, after running approximately 100 yards, disappears into the ground, still on his property. (C-11, 12; A-21, 22.) He is not a tribal member and has no voice in tribal government. (C-4; A-20.)

This project comes within the asserted jurisdiction of tribal government under its Aquatic Lands Conservation Ordinance ("ALCO"), also known as tribal ordinance 87A. (C-1, 34; A-19, 26.) The Agricultural Stabilization and Conservation Service ("ASCS") informed Mr. Middlemist that while the project qualified for federal funding of $1,050.00[6] such funding would be withheld until he obtained a tribal permit pursuant to ALCO, in addition to obtaining permits from the Army Corp of Engineers and the Montana Department of Fish, Wildlife and Parks. (C-14, 15, 17; A22, 23.)

Wayne Maughan, a second-generation farmer on the reservation, residing in Lake County, Montana, like Mr. Middlemist, is not a tribal member and has no voice in tribal government affairs. (C-6, 20; A-20, 23.) In cooperation with the JBC and utilizing funds provided by the JBC for a water conservation demonstration project,[7] Mr.

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[6] In the Complaint, this amount was stated as $1,000.00. (C-14; A-22.) However, a subsequent letter to Mr. Middlemist from the ASCS revealed the available funding to be $1,050.00. This letter was attached to Middlemist's brief in response to the CSKT government's motion to dismiss as part of Exhibit A.

[7] The JBC has participated in this project because it will improve water quality by greatly reducing or eliminating discharges from the small reservoir behind the dam through increased storage capacity and reuse of irrigation return flows, and because by capturing more runoff and irrigation return flows for reuse, the need of Mr. Maughan for deliveries of water to his farm will be decreased, thereby making more water available for upstream irrigators. (C-24, 26, 27; A-24.) Accordingly, the JBC passed a resolution November 13, 1990, numbered Resolution No. 90-04, and set aside $3,000.00 to help pay for the project. (C-25; A-24.)

Maughan desires to repair a small dam located on his own fee land. (C-23, 24, 25; A-24.)

This project is also within the asserted jurisdiction of tribal government under ALCO. Like Mr. Middlemist, Mr. Maughan and the JBC were advised by the U. S. Government, acting through the U. S. Corps of Army Engineers, that, in addition to applying for a variety of federal, state and local government permits and approvals,[8] they had to apply to the CSKT government for a permit pursuant to ALCO as a condition precedent to undertaking the proposed conservation activities. (C-30; A-26.)

Under ALCO the CSKT government claims authority to regulate all activity – no matter how minor – planned on wetlands located within the exterior boundaries of the reservation, whether that land is owned by the United States or the CSKT government, tribal members, or, as in the cases of Messrs. Middlemist and Maughan, by non-

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[8] Mr. Maughan and the JBC have applied for a "404 permit" from the Army Corps of Engineers pursuant to the Federal Clean Water Act; a Montana Pollutant Discharge Elimination System ("MPDES") permit from the State Water Quality Bureau of the Department of Health and Environmental Sciences ("DHES"); a "124" Stream Preservation Act permit from Montana State Department of Fish, Wildlife and Parks; a "310" Natural Stream Bed and Land Preservation Act permit from the Lake County Soil Conservation District; a "3A" permit related to a short-term turbidity variance during construction, from the DHES; and a flood plain development permit from the State Department of Natural Resources and Conservation ("DNRC"). (C-29; A-25.)

members who propose to undertake activity on their own fee land. (C-34, 41, 42, 43; A-26, 27.)[9]

The CSKT Department of Natural Resources administers ALCO through the Shoreline Protection Office ("SPO"). (C-38; A-27.) The terms of ALCO require the submission of plans to the SPO for review, approval, modification, rejection, and issuance of a permit for any project on wetlands prior to doing any work. (ALCO, Part 4, §§ 1, 3; A-38, 39.) ALCO imposes fines of up to $500.00 per day for each violation of its provisions, including failure to submit plans, acquire a permit, comply with conditions and modifications dictated by the SPO, or continuance with a disapproved project. (ALCO, Part 6, § 2, ALCO Regulations, §§ 5.1, 5.9; A-39, 40, 41, 42.)[10] It also provides for the imposition of remedial measures at the expense of the noncomplying person, as well as removal of a project and restoration of the physical surroundings. (ALCO, Part 6, § 2, R. 5.5, 5.7, 5.8, 5.9; A-39, 40, 42, 43, 44.) The ordinance also purports to authorize CSKT government officials and employees unfettered and

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[9] The tribal government has advertised the applicability of ALCO throughout the Reservation as follows:

> "Private individuals; corporations, local, county, state, tribal and federal government agencies who are going to be doing any type of construction work on or near any natural streams, rivers, lakes, or wetlands within the Flathead Reservation *must submit an application and obtain an approved permit before any disturbance of the bed and banks of these waterways occurs.*"

(Emphasis in original.) (A-45.) This advertisement was attached as Exhibit D. to Middlemist's brief in response to the CSKT government's motion to dismiss.

[10] Hereinafter ALCO Regulations are cited as "R. ___."

unpermitted access to search, without a warrant, any property within the reservation, without regard to landownership, if a violation is suspected. (ALCO, Part 6, § 1; A-39.) Implementing regulations provide that the SPO may enter another's land, again without a warrant, and "undertake the removal of the project and restoration of the underlying property" at the cost to the landowner. (R. 5.8; A-43.)

Middlemist challenges the CSKT government's assertion of regulatory jurisdiction over nonmember activities on fee land as patently unconstitutional and violative of the limits of tribal jurisdiction established by this Court's decisions.[11] Despite this conviction, Middlemist fears the imposition of heavy fines and penalties for any refusal to submit to tribal authority. Consequently, Middlemist sought relief by filing an action for declaratory and injunctive relief in the United States District Court for the District of Montana, naming federal and tribal defendants

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[11] On the Flathead Reservation such assertions of jurisdiction have become the rule rather than the exception despite any limits established by this Court. For example, since the decision in *Montana*, 450 U.S. 544 (1981), the Tribal Council has enacted at least four ordinances where it claimed jurisdiction over nonmembers on fee land. These ordinances are 87A, at issue here; 44D, Hunting and Fishing Ordinance; 89B, Water Quality Management Ordinance (enacted after *Brendale*, 492 U.S. 408 (1989)); and 64A, Shoreline Protection Ordinance. Review by this Court of tribal government's jurisdiction over nonmembers under 64A has been sought and denied in the past. *Namen v. CSKT*, 459 U.S. 977 (1982), cert denied; Rehnquist J. and White J. dissenting. See *Namen v. CSKT*, 665 F.2d 951 (1982). However, the Ninth Circuit's decision in *Namen* rested on its holding that the CSKT own the bed and banks of the south half of Flathead Lake. The CSKT have no ownership interest in the lands in question here.

for their part in promulgating, approving, implementing, and supporting the application of ALCO against the Plaintiffs.[12] (Complaint; A-17-37.)

3. The Decision Below.

The federal and tribal defendants moved to dismiss on various grounds. In granting these motions the District Court ruled only on the issues raised by the abstention doctrine as set out in *National Farmers Union Insurance Co. v. Crow Tribe*, 471 U.S. 845 (1985) and *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987), and Ninth Circuit interpretations of those decisions. Even though there are no ongoing tribal proceedings, the lower court refused Middlemist declaratory relief pursuant to 28 U.S.C. § 2201-2202, requiring that all tribal administrative and judicial remedies first be exhausted. In dismissing Middlemist's argument that an exception to the doctrine was present here because the CSKT government's assertion of jurisdiction patently violates the Constitution and the limits of tribal jurisdiction defined by this Court in *Montana v. United States*, 450 U.S. 544 (1981) and *Brendale v. Confederated Bands of Tribes of the Yakima Nation*, 492 U.S. 408 (1989), the court below refused to

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[12] Middlemist named the individual tribal government officials as Defendants based on the principles of *Ex Parte Young*, 209 U.S. 123, 159-60 (1908), and its progeny, which are applicable to tribal government officials acting beyond their legal authority. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978); see also *BNRR v. Blackfeet Tribe, et al.*, 924 F.2d 899, 901-902 (1991): "Tribal sovereign immunity does not bar a suit for prospective relief against tribal officers allegedly acting in violation of federal law."

rely on or even examine this Court's decisions defining tribal civil regulatory jurisdiction over nonmembers on fee land or to credit the constitutional arguments raised by Middlemist. Cf. *Duro v. Reina,* 495 U.S. 676 (1990).

REASONS WHY THE WRIT SHOULD BE GRANTED

I. The Imposition of Tribal Governmental Power Over Nonmembers On Their Own Fee Land In Violation Of Fundamental Constitutional Rights Is Of Imperative Public Importance To Hundreds Of Thousands Of People Nationwide.

The assertion of the CSKT government's authority threatens Middlemist's fundamental constitutional rights to full political participation in the government under which they must live, *Wesberry v. Sanders,* 376 U.S. 1, 17 (1964), and all the other civil liberties these rights preserve. *Reynolds v. Sims,* 377 U.S. 533, 562 (1964). Nationwide, almost 400,000 individuals who are not tribal members live on 280 Indian reservations and are in the same legal position in relation to the local tribal governments as Middlemist.[13]

In this respect, this case rests on the same constitutional and jurisprudential foundations as a number of prior cases in which this Court granted a writ of certiorari before judgment in an Appeals Court to ensure the protections of the Constitution extended to all people.

[13] See footnote 19 and accompanying text.

City of New Orleans v. Barthe, 376 U.S. 189 (1964) (affirming district court order desegregating public parks); *Bolling v. Sharpe*, 344 U.S. at 3 (1952) (certiorari petition invited), 344 U.S. 873 (1952) (cert. granted) 347 U.S. 499 (1954) (desegregation of public schools in the District of Columbia); *United States v. Thomas*, 361 U.S. 950 (1960), 362 U.S. 58 (1960) (voting rights); *Hannah v. Slawson*, 361 U.S. 910 (1959) (voting rights); *Taylor v. McElroy*, 360 U.S. 709, 710 (1959) (employment status restored); see also *Griffin v. County School Board of Prince Edward County*, 375 U.S. 391 (1964), 377 U.S. 218 (1964) (review granted prior to judgment to rectify respondent's defiance of prior ruling ordering public school desegregation).[14]

As this Court has recently noted, governmental regulation can vary from a minor incidental burden to a crushing weight. *Lucas v. South Carolina Coastal Council*,

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[14] Moreover, to the extent the issues here are not resolved on constitutional grounds but on an analysis of the effects of Acts of Congress (General Allotment Act, 24 Stat. 388 (1887); Flathead Allotment Act, 33 Stat. 302) on tribal Treaty rights to exclude nonmembers, *Middlemist* is analogous to earlier cases decided by this Court after issuing a writ before judgment in an Appeals Court on the grounds that the proper construction of the statutes involved was of wide public significance and the cases presented similar or identical questions. *Porter v. Dicken*, 328 U.S. 252, 254 (1946) (construing Emergency Price Control Act); *White v. Mechanics Securities Corp.*, 269 U.S. 283, 299 (1925) (construing the Trading with the Enemy Act); *McCulloch v. Sociedad Nacional*, 372 U.S. 10 (1962) (construing jurisdictional scope of National Labor Relations Act); *Johnson v. United States Shipping Board*, 280 U.S. 320, 324-25 (1930) (construing the Suits in Admiralty Act); and see *Mistretta v. United States*, 488 U.S. 361, 371 (1989) (constitutionality of federal sentencing guidelines issued under Sentencing Reform Act).

___ U.S. ___, 112 S.Ct. 2886 (1992). If the power to tax is the power to destroy, *McCulloch v. Maryland*, 4 Wheat 316, 431 (1819), the power to regulate is the power to dictate the price or conditions of continued existence. And this power may ultimately destroy its object as surely as taxation. *Lucas*, ___ U.S. ___, 112 S.Ct. 2886.

The legislative and regulatory powers of government are balanced by the fact the governed have rights of full political participation. They consent to government in exchange for these rights.[15] These rights are among the most important rights of citizens safeguarded by the Constitution as they are preservative of all other civil liberties. *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the

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[15] Moreover, consent is given not only for these rights but also for the protections afforded by the Constitution to those who find themselves at the mercy of the majority which has approved of a particular governmental action. Thus, the Constitution affords certain baseline protections beyond which government may not pass. These protections, including the right to just compensation for a governmental taking, are embodied in the Bill of Rights. Through the doctrine of incorporation the fundamental protections guard citizens against the actions of either of the two sovereigns established in the Constitution – the federal government and the states. Since tribal sovereignty is extraconstitutional and tribal governments are not constrained by the Bill of Rights, *Talton v. Mayes*, 163 U.S. 376 (1896), these basic protections neither limit tribal governmental actions nor protect those over which it rules.

> most basic, are illusory if the right to vote is undermined.

Wesberry v. Sanders, 376 U.S. 1, 17 (1964).

In the context of nonmembers falling under a tribal government's power, however, such rights do not exist. Therefore, no safeguards exist. The strict preservation of these rights and their protection from limitation in the absence of the utmost justification constitutes the consideration from the government in return for the consent of the governed. Indeed, the Court expressed a fundamental, immutable tenet of our system when it said:

> In this Nation each sovereign governs only with the consent of the governed.

Nevada v. Hall, 440 U.S. 410, 426 (1979).

In direct contravention of this animating principle of government (to which the CSKT government itself adheres in dealing with tribal members), the CSKT government asserts its regulatory jurisdiction over nonmember land use on their own fee land. It claims to possess such authority while lacking any constitutional basis for its sovereignty. *United States v. Kagama*, 118 U.S. 375, 379 (1886); *United States v. Blackfeet Tribe*, 364 F.Supp. 194, 195 (D. Mont. 1973) ("As applied to Indian Tribes 'sovereign' means no more than within the will of Congress."); see also *Oliphant v. Schlie*, 544 F.2d 1007, dissent of Kennedy, J., at 1014, n.3 (9th Cir. 1976), reversed, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). Middlemist challenges these assertions of jurisdiction over the lives, livelihoods, and land of nonmembers as patently unconstitutional because under tribal jurisdiction they are literally at the mercy of a government in which they can

exercise no rights to participate and thereby affect its actions.

These issues are of wide significance. Nationally, of the 780,028 people living on Indian reservations, at least 47.3 percent are not tribal members.[16] Pursuant to the General Allotment Act, 25 U.S.C. § 331 et seq., and other Acts of Congress, these nonmembers have come to lawfully hold fee title to many millions of acres on reservations. See *Brendale*, 492 U.S. at 436, n.1, opinion of Stevens, J.

On the Flathead Reservation alone, nonmembers, according to the CSKT government's statistics, own in fee approximately 490,120 acres.[17] Of the 113,000 acres within the three Irrigation Districts which comprise the JBC, approximately 90 percent is owned in fee by nonmembers. According to U.S. census statistics the population of the Flathead Reservation is 21,259. (C-60; A-30.) Of this

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[16] U.S. Department of Commerce, Bureau of the Census, News Release July 11, 1991, Table 1. These census statistics reflect the race and not the tribal affiliation of the population. Therefore, a portion of the *Indian* population living on Reservations, which is 54.1 percent of the total, would not be tribal members. Thus, the percentage of *nonmembers*, whether Indians or not, living on reservations exceeds 47.3 percent.

[17] In the Complaint, the amount of nonmember land owned in fee, as well as other land ownership facts, were approximations based on the best available information. (C-48; A-28.) It was there stated that nonmembers owned in fee approximately one-half of the reservation area, which totals1.2 million acres. Since the filing of the Complaint, the CSKT submitted information to the federal government, which the Petitioners obtained through inspection of files open to the public, giving the more precise figures of land ownership found in this Petition.

total, 3,000 or 14 percent are tribal members, and only they enjoy rights of participation in tribal government. (*Id.*)

Tribes are afforded wide latitude to govern in accordance with their own culture and traditions, *Duro v. Reina*, 495 U.S. 676 (1990), even to the point of taking actions offensive to the Constitution. *Santa Clara Pueblo v. Martinez*, 436 U.S. 39, 56, n.7 (1978). Clearly, then, the CSKT government's claim to sovereign authority over nonmembers cannot be viewed as merely another layer of governmental regulation nor can it be viewed as a de minimis burden. The extraconstitutional nature of tribal power – both its origin and obligations to those it would govern – as the basis of tribal authority over nonmembers requires that it be narrowly limited and clearly defined. The extraconstitutional nature of tribal power is "all the more reason to reject an extension of tribal authority over those who have not given the consent of the governed that provides a fundamental basis for power within our constitutional system." *Duro*, 495 U.S. at 694; citing the dissent, Stevens J., in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 172-173 (1982).

Only timely review and decision by this Court, based on the holding that the CSKT government lacks the jurisdiction it asserts here because of the constitutional protections afforded Middlemist, will resolve the issue on a stable and unshakable foundation.

II. Middlemist is Entitled to Have This Matter Resolved in a Federal Forum Because The CSKT's Assertion of Jurisdiction Defies the Fundamental Limitations upon Tribal Sovereignty Established by this Court.

A. The Lower Court Should Not Have Abstained Because The CSKT's Assertion of Jurisdiction Defies The Limits of Their Power Over Non-members Established by This Court.

Lacking any textual source in the Constitution for exercising sovereign power, tribal jurisdiction over non-members has been closely cabined by this Court. Indeed, the Court has recently stated that Tribes possess "very narrow powers . . . over the conduct of non-Indians within their reservations." *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, ___ U.S. ___, 112 S.Ct. 683, 692 (1992) (referring to *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 431 (1989); and *Montana v. United States*, 450 U.S. 544, 566 (1981)).

In *Montana*, the Court clearly set out the general rule that tribal governments lack jurisdiction over nonmember activity on fee lands. *Montana*, 450 U.S. at 564-565. It grounded this rule on the principles enunciated in *United States v. Wheeler*, 435 U.S. 313 (1978), and *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), and their most distant predecessor, *Fletcher v. Peck*, 6 Cranch (10 U.S.) 87 (1810), to the effect that through incorporation into the United States Tribes had been divested of the "right of governing every person within their limits except themselves." *Oliphant*, 435 U.S. at 209. It then recognized that a tribe *may* "retain inherent sovereign power" to regulate

some nonmember activity on fee lands where the nonmember has entered consensual relations (not applicable here) with a Tribe or the nonmember activities "so threaten the Tribe's political or economic security, as to justify tribal regulation." *Montana*, 450 U.S. at 565-566.[18]

In *Brendale*, a clear majority of the court (6-3) held as to the nonmember fee land in the "open" area of the reservation that the Yakima Tribe lacked jurisdiction to enforce its zoning ordinance. (The Petitioners' land here is indisputably in the "open" area of the reservation.) The plurality opinion of Justice White and the concurring opinion of Justice Stevens are in harmony as to the effect of the loss of the right of the tribe to exclude nonmembers. The incorporation of Tribes into the United States and their loss of the power to exclude as the result of Acts of Congress forever altered the "platonic notions" of tribal sovereignty. *County of Yakima*, 112 S.Ct. at 687. While the form may remain the substance now consists only of those powers not inconsistent with Tribes' dependent status. Recently, the Court indicated this left Tribes "very narrow powers" over non-Indians. *Id.*, at 692. Yet, the tribal government here refuses to acknowledge the limits of its authority over nonmembers.

Such action flies in the teeth of this Court's decisions in *Montana* and *Brendale*.[19] These decisions cannot be

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[18] Middlemist argues the careful wording of this language is a recognition of the exceptional circumstances required to justify tribal jurisdiction in this situation because it entails the loss of the fundamental rights discussed above.

[19] Not to mention the Court's decisions before and after these cases which provide a definitive framework of analysis

distinguished on any principled basis. They control the issue and clearly state that in the factual situation presented here the tribal government has no jurisdiction. Much more than a mere claim to authority must be required to "justify tribal regulation" of nonmember activity on fee land. *Montana*, 450 U.S. at 565-566. Indeed, for a Tribe to have a protectable interest vindicable in federal court "[t]he impact must be demonstrably serious and must imperil the political integrity, the economic security, or the health and welfare of the tribe." *Brendale*, 492 U.S. at 430-431. Clearly, this does not leave the CSKT government without remedies if it perceives a threat arising from Middlemist's activities, which seems unlikely given the nature of the projects and the State and Federal regulation already legitimately in force. But even a perceived threat is, at best, an ephemeral basis on which to assert sovereign authority. *Brendale*, 492 U.S. at 430-431. Yet, without timely intervention by the Court and clear demarcation of the tribal governments' jurisdiction over nonmembers based on constitutional principles, the defiance of the limits established by this Court and the Constitution of lawful tribal authority exemplified by ALCO cannot be effectively challenged.

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illustrating the tribal government's assertion of jurisdiction here is barred. *United States v. Wheeler*, 435 U.S. 313 (1978); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Duro v. Reina*, 495 U.S. 676 (1990); *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 112 S.Ct. 683 (1992).

B. The Abstention Doctrine Should Not Apply Where The Challenged Action is Clearly Violative of the Constitution and Tribal Jurisdiction and Abstention Serves Only to Delay Resolution of the Matter and Exhaust Petitioners' Ability to Vindicate Their Federal Constitutional Rights.

The decision below promotes two vices. First, the tribal abstention doctrine applied in the absence of ongoing tribal proceedings entails more deference to tribal institutions than federal courts accord States. Secondly, abstention in the absence of ongoing tribal proceedings will chill and perhaps freeze the fundamental rights of nonmembers such as Middlemist to make use of their property by eliminating their federal right to a declaratory judgment pursuant to 28 U.S.C. § 2201.

As argued above, the challenged tribal action clearly violates Petitioners' constitutional rights and exceeds jurisdictional limits established by this Court. "When the unconstitutionality of the particular . . . action under challenge is clear, a federal court need not abstain from addressing the constitutional issue. . . . " *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 756 (1986). This rationale applies here and perhaps with even greater force since the fundamental rights of political participation are in issue. *Houston v. Hill*, 482 U.S. 451, 467 (1987) (courts should be "particularly reluctant to abstain in cases involving facial challenges based on the First Amendment.") Indeed, Middlemist has invoked the exception to abstention based on these very arguments, but the district court refused to examine the decisions and constitutional limits of tribal jurisdiction, instead looking only to abstention principles.

The tribal abstention doctrine, animated by the salutary goals of Congress embodied in the Indian Self-Determination Act, 25 U.S.C. §§ 450, 450a, and Indian Civil Rights Act, 25 U.S.C. §§ 1301-1341, (of which neither mentions nor implies, even once, tribal jurisdiction over nonmembers) was never meant to cloak from scrutiny assertions of power clearly in excess of limits established by the Constitution and this Court. In the *National Farmers* and *Iowa Mutual* decisions, the Court explicitly recognized exceptions to the doctrine to allow federal courts to efficiently deal with such claims. *National Farmers*, 471 U.S. at 856, n.21; *Iowa Mutual*, 480 U.S. at 19, n.12.

Moreover, aside from the applicable exceptions, the lack of ongoing tribal proceedings renders the abstention doctrine itself inapplicable. The doctrine was not intended to deprive federal plaintiffs of judicial remedies conferred by Congress in the Declaratory Judgment Act. 28 U.S.C. §§ 2201-2202. In the absence of ongoing tribal proceedings, the requisite factors to justify abstention are not present. In both *National Farmers* and *Iowa Mutual* the Federal court was asked to intervene in ongoing tribal court proceedings concerning a civil tort action. Thus, a central element of the Court's decision in those cases to allow district courts to abstain from their "virtually unflagging" duty to exercise their jurisdiction, *Colorado River Water Conservation District v. U.S.*, 424 U.S. 800, 817 (1976), was whether there was an ongoing tribal proceeding.

Here, there are no ongoing tribal proceedings, whether judicial or administrative, to which the federal

court could defer.[20] However, in conflict with the general principles of tribal abstention established by this Court in *National Farmers* and *Iowa Mutual* and in conflict with the general principles requiring Federal courts to exercise their jurisdiction, the Ninth Circuit Court of Appeals has essentially imposed an "unflagging duty" on district courts to *abstain* anytime an issue of tribal jurisdiction arises in any context.[21]

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[20] In fairness to the district court, the decisions of the Ninth Circuit Court of Appeals expounding on the abstention principles set down by this Court have gone far beyond the doctrine enunciated in *National Farmers* and *Iowa Mutual*, leaving the federal district courts no room to analyze whether to exercise their jurisdiction or abstain. In *Stock West Corp. v. Taylor*, 942 F.2d 655, 661 (1991), the Ninth Circuit stated that when the issue in dispute is a "reservation affair," "the federal court has no option but to defer." Thus, the issue has been transformed from whether the factors of comity would allow abstention to a more mechanical question of whether the matter arises on a reservation and is, therefore, a reservation affair. *Id.*

[21] Relief from this "mandatory" deference to tribal courts has been allowed by the Court of Appeals on two occasions. In the first *BNRR v. Blackfeet Tribe*, 924 F.2d 899, 901, n. 2, the Court of Appeals explained abstention was not required, in part, because "no proceeding is pending in any tribal court. . . . " However, in the second case in which abstention was not required *Stock West Corp. v. Taylor*, 942 F.2d 655, 663, (1991), the court described the *Blackfeet Tribe* holding as an anomaly tolerated, primarily, because the ultimate decision of the court on the jurisdictional issue favored the Tribes. The *Stock West* court then also declined to abstain, citing the same rationale, but also noting that when the issue in dispute is a "reservation affair," "the federal court *has no option but to defer.*" *Stock West*, 942 F.2d at 661.

The tribal abstention doctrine is clearly patterned after the doctrine enunciated in *Younger v. Harris*, 401 U.S. 37 (1971), and elaborated in later cases.[22] A central and continuing requirement for abstention in the *Younger* context is that there is an ongoing state proceeding in favor of which the federal court should abstain. *New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 491 U.S. 350 (1989) ("*NOPSI*"). If there is no ongoing state proceeding and a plaintiff has invoked the federal court's jurisdiction, *Younger* abstention does not apply. "[T]he relevant principles of equity, comity and federalism have little force in the absence of the pending state proceeding." *Steffel v. Thompson*, 415 U.S. 452, 462-463 (1974). To require abstention absent an ongoing proceeding would "make a mockery of the rule that only exceptional circumstances justify a federal court's refusal to decide a case. . . . " *NOPSI*, 491 U.S. at 368. Indeed, to require abstention absent an ongoing tribal proceeding "would leave a party's constitutional rights in limbo while an agency contemplates enforcement but does not undertake it." *Telco Communications, Inc. v. Carbaugh*, 885 F.2d 1225, 1229 (4th Cir. 1989) (citations omitted). Abstention in this context would place a plaintiff "between the Scylla of intentionally flouting [tribal] law and the Charybdis of forgoing what [it] believes to be constitutionally protected activity in order to avoid becoming enmeshed in enforcement proceedings." *Id.*, quoting *Steffel*, 415 U.S. at 462.

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[22] The only abstention decisions cited in *National Farmers* were *Younger* abstention cases; and the same is true for the *Iowa Mutual* decision except for one reference to *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976).

As in the *Younger* abstention context, ignoring this basic requirement here would strip from nonmembers needing to challenge abuses of power by tribal governmental officials the remedy provided by Congress in the Declaratory Judgment Act. (28 U.S.C. 2201, et seq.) Congress enacted this remedy specifically to mesh with the doctrine first enunciated in *Ex Parte Young*, 209 U.S. 123, 159-160 (1908), creating an exception to the doctrine of sovereign immunity and allowing a plaintiff to name a governmental official acting in excess of lawful powers as a defendant. *Steffel v. Thompson*, 415 U.S. 452, 463-467 (1974). Middlemist has employed this very remedy here. (C-Relief Requested; A-36-37.)

Under the district court's ruling, Middlemist would be required to exhaust not only tribal judicial remedies but, prior to that, administrative remedies as well. Middlemist disputes the authority of the CSKT government to impose its administrative regulatory process on nonmember activities on fee land. Yet Middlemist cannot risk incurring the penalties imposed on nonmembers if they violate the CSKT ordinance. Certainly, this is neither the intended nor desired result of the abstention doctrine enunciated in *National Farmers*.

Without timely intervention by this Court, then, the defiance of the lawful limits of tribal authority as established by this Court and the Constitution, which Petitioners challenge here, cannot be effectively remedied. If the tribal abstention doctrine does not include the requirement that there be an ongoing tribal court proceeding, federal court's will be required to give Tribes greater deference than they do states. Additionally, plaintiffs wishing to invoke their federal statutory right under

the Declaratory Judgment Act to challenge governmental abuses of power without actually violating the statute will not only be stripped of this right but left with no timely remedy whatsoever.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that their Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit be granted.

DATED this 30th day of April, 1993.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

* * *

ROSS MIDDLEMIST,
WAYNE W. MAUGHAN
FLATHEAD JOINT BOARD
OF CONTROL,

Plaintiffs,

-v-

SECRETARY OF THE
UNITED STATES
DEPARTMENT OF
INTERIOR, Manuel Lujan,
Jr., et al.,

Defendants.

CV 91-155-M-CCL

OPINION AND
ORDER

(Filed Feb. 12, 1993)

* * *

The Joint Board of Control (JBC) and two individuals have filed this action against the officials of the Department of Interior and individual officials of the Confederated Salish and Kootenai Tribes (Tribes) alleging that the Tribes have no authority to exercise regulatory jurisdiction over activities of non-members on the Flathead Reservation on "fee" lands. Plaintiffs seek declaratory and injunctive relief barring the Tribal government from applying Tribal Ordinance 87A, the Aquatic Lands Conservation Ordinance (ALCO), against the Plaintiffs anywhere and under any circumstances. Plaintiffs are also suing the United States for its role in approving ALCO

and for allegedly providing funding to develop, implement and enforce the Ordinance. Against the Federal Defendants, Plaintiffs seek relief in the nature of mandamus requiring the disapproval of the Ordinance as it applies to nonmember activity.

Tribal Defendants and Federal Defendants have each moved to dismiss the action. Tribal Defendants argue that the court lacks personal jurisdiction over the Tribal governmental officials named in the suit because of the Tribes' sovereign immunity; that Plaintiffs lack standing and capacity to sue; and that Plaintiffs have failed to exhaust Tribal remedies.

The Federal Defendants move to dismiss on the grounds that the Tribes are a necessary and indispensable party to this action and that the actions of the Federal Defendants are protected by sovereign immunity. Federal Defendants also assert that Tribal remedies have not been exhausted.

FACTUAL BACKGROUND

ALCO is a civil regulatory ordinance designed to effectuate the Tribal and federal goals of protecting the quality of Reservation aquatic habitat. The Tribal Council approved ALCO on December 13, 1985. The Secretary of Interior approved ALCO in accordance with the provisions of the Tribal Constitution on December 20, 1985. The Tribes proposed regulations to implement ALCO and published legal notice of the proposed regulations for public comment. The regulations were adopted pursuant to the Tribal Administrative Procedures Ordinance after a comment period. Neither the JBC nor the individual

Plaintiffs sought to challenge the regulations during this notice and comment period.

Plaintiff Ross Middlemist is an irrigator served by the Flathead Irrigation and Power Project (FIPP) and is a constituent and member of the Joint Board of Control. His property lies within the exterior boundaries of the Reservation. Mr. Middlemist intended to engage in a project to improve a natural spring site on his property which he uses to supply a stockwater tank. On September 17, 1991, Middlemist went to the Agricultural Stabilization and Conservation Service (ASCS) in Sanders County and applied for funding for his project which was approved in the amount of $1,050. In October of 1991, Middlemist was informed by the ASCS that in addition to applying for permits for the project from the Army Corps of Engineers and the Montana Department of Fish, Wildlife, and Parks, he would have to apply for a permit from the Tribal Shoreline Protection Office pursuant to the terms of ALCO. Middlemist never applied for such a permit and, therefore, has never paid a filing fee nor been rejected by the Tribal agency. He has not done any construction on his improvement project.

Plaintiff Wayne Maughan also holds fee simple title to property within the exterior boundaries of the Reservation. He is also an irrigator served by FIPP and represented by the JBC. Mr. Maughan has an impoundment reservoir on his property which is fed by Maughan Creek. The dam on Maughan's property requires improvement for safety, water quality reasons, and to expand the capacity of the reservoir.

In their complaint, Plaintiffs allege that the improvement of this dam will improve the quality of the water flowing downstream by allowing greater storage and settling of runoff and irrigation return flows. Additionally, it is believed that the improvement project will result in more water available for upstream irrigators by requiring less to be delivered to Maughan.

To facilitate this project, the JBC passed a resolution on November 13, 1990 and set aside a grant of $3,000 to help pay for the project asserting that the project will benefit the JBC and its constituents. The JBC retained an engineering firm to design and draft plans for the improvement of the dam. Plaintiffs Maughan and the JBC then began the process of applying for state and federal permits and approvals. They did not apply for a permit from the Tribal Shoreline Protection Office, paid no fees, and were not denied a permit by that agency.

Plaintiffs generally assert that the Tribes do not have authority over non-members and that the exercise of Tribal jurisdiction over them is violative of their constitutional rights. Plaintiffs list these rights as the right to vote and hold office in the government under which they live; the right to sit on a jury; the right to be judged by a jury of their peers; and the right to a jury trial in a civil matter.

DISCUSSION: EXHAUSTION OF TRIBAL REMEDIES

Though Defendants have stated various grounds in support of their motions to dismiss, the court finds that the issue of exhaustion of tribal remedies is dispositive of this action in its present posture.

It is well settled that the question of whether an Indian tribe retains the sovereign power to compel a non-Indian property owner to submit to the civil jurisdiction of the tribe gives rise to a federal question. The issue here is whether, in these circumstances, this court must defer exercising jurisdiction until such time as the Tribes' administrative and judicial forums have been exhausted.

In *Burlington Northern Railroad Co. v. Crow Tribal Council,* 940 F.2d 1239 (9th Cir. 1991), the Ninth Circuit Court of Appeals stated:

> The Supreme Court has mandated the exhaustion of tribal remedies as a prerequisite to a federal court's exercise of its jurisdiction: "[E]xhaustion *is required* before such a claim may be entertained by a federal court." *National Farmers Union,* 471 U.S. at 857, 105 S.Ct. at 2454. In *Iowa Mutual Ins. v. LaPlante,* the Supreme Court said that "federal policy . . . directs a federal court to stay its hand," and "proper respect . . . requires" tribal remedy exhaustion. 480 U.S. at 16, 107 S.Ct. at 976. Therefore, non-Indian petitioners "*must* exhaust available tribal remedies." *Id.* The LaPlante Court emphasized that "*National Farmers Union requires* that the issue of jurisdiction be resolved by the Tribal courts in the first instance." *Id.*

BN v. Crow Tribe, 940 F.2d at 1245 (emphasis in original).

However, before deferring to a tribal forum, "a federal court must examine the circumstances of the individual case in order to determine if deference is necessary, in light of the purposes of the exhaustion requirement." *Stock West Corp. v. Taylor,* 942 F.2d 655. (9th Cir. 1991). These purposes, as set forth in *National Farmers Union*

Insurance Company v. Crow Tribe, 471 U.S. 845 (1985), and *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9 (1987), include the development of tribal self-government, practical considerations of judicial efficiency, and the benefits of tribal expertise and explanations.

Federal Law and Ongoing Proceedings

Plaintiffs initially argue that exhaustion is not applicable in this case because the asserted claims only raise issues of federal law and because there is no ongoing tribal proceeding involved. Exhaustion, however, cannot be avoided for either of these reasons.

Any dispute concerning the extent of tribal sovereignty and authority will involve questions of federal law. The Supreme Court recognized this fact in *National Farmers Union* when it stated that the determination of "the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which the sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." *National Farmers Union*, 471 U.S. at 855-856. Even though these sovereignty issues involve federal law, the Court decided that such an examination "should be conducted in the first instance in the Tribal Court itself." *Id.* Therefore, the fact that the jurisdictional question falls under federal law and raises constitutional concerns does not defeat the exhaustion requirement.

Furthermore, the lack of an ongoing proceeding in a tribal forum does not negate the exhaustion requirement.

In *Crawford v. Genuine Parts Co., Inc.*, 947 F.2d 1405 (9th Cir. 1991), it was held that "[w]hether proceedings are actually pending in the appropriate tribal court is irrelevant." *Id.* at 1407.

The court recognizes that in *Burlington Northern v. Blackfeet Tribe*, 942 F.2d 899 (9th Cir. 1991), the Circuit Court did not require exhaustion because the case presented issues of federal law and no proceeding was pending in tribal court. However, this particular holding has been called an anomaly by the Circuit Court itself in a subsequent case. *Stock West*, 942 F.2d at 633, note 7. Additionally, the clear statement in *Crawford* concerning pending proceedings raises serious questions concerning the validity of *BN v. Blackfeet Tribe* on the exhaustion issue. Therefore, in light of the Circuit Court's clear pronouncement on this issue in *Crawford*, the court finds that the lack of a tribal proceeding does not negate the exhaustion requirement.

Similarly, Plaintiffs rely on the holding of *Stock West* to support their contention that the lack of an ongoing tribal proceeding nullifies the exhaustion requirement. Plaintiffs' reliance on this case, however, is misplaced. The court in *Stock West* held that when an issue in dispute is a "reservation affair" or arises on the reservation, "the federal court has no option but to defer." *Stock West*, 942 F.2d at 661. In reaching its conclusion that the dispute in Stock West was not a "reservation affair," the court pointed to the lack of an ongoing tribal proceeding and the lack of issues related to tribal law. Therefore, the court merely viewed these facts as indicative of a non-reservation affair.

In this case, Plaintiffs have alleged that the subject waters and lands at issue are situated within the exterior boundaries of the Flathead Indian Reservation. Additionally, Plaintiffs are suing Tribal officials and seek to invalidate a Tribal ordinance. Unquestionably, this case is a "reservation affair" which triggers the mandatory exhaustion requirement. *Stock West*, 942 F.2d at 661; *Crawford*, 947 F.2d at 1408.

Policy Imperatives

Even if the dispute here constitutes a "reservation affair," Plaintiffs contend that exhaustion should not be required because none of the purposes for exhaustion set forth in *National Farmers Union* would be advanced in this case. Plaintiffs' contention, however, is not supported by the law or the facts.

In *National Farmers Union*, the Court stated that the first of the three policy imperatives behind exhaustion was based on the Congressional commitment "to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the legal and factual bases for the challenge." *National Farmers Union*, 471 U.S. at 856. Additionally, the court stated:

> Moreover the orderly administration of justice in the federal court will be served by allowing a full record to be developed in Tribal Court before either the merits or any question concerning appropriate relief is addressed. The risks of the kind of "procedural nightmare" that has

> allegedly developed in this case will be minimized if the federal court stays its hand until after the Tribal court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made. Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.

National Farmers Union, 471 U.S. at 856-857.

In *BN v. Crow Tribe*, which is controlling in this case, the Circuit Court addressed the *National Farmers Union* imperatives in the context of a case strikingly similar to the one at bar. In *BN v. Crow Tribe*, the plaintiffs filed suit in federal court seeking a declaratory judgment against tribal officials to invalidate a tribal civil regulatory ordinance as exceeding the Tribes' jurisdiction. In determining that the imperative of tribal self-government would be advanced by exhaustion, the court stated:

> The policy of tribal self-government and self-determination goes to the heart of this case. Through the challenged ordinance, the Tribe reasserts its commitment to sovereign authority over Reservation affairs. The ordinance establishes governmental mechanisms for exercise of that authority. Moreover, the ordinance identifies railroad services as vital to the Tribe's economic development.

BN v. Crow Tribe, 940 F.2d at 1245.

In this case, the Confederated Tribes have asserted their commitment to sovereign authority over Reservation affairs through Ordinance 87A which establishes governmental mechanisms for the protection of aquatic habitat on the Reservation. As in *BN v. Crow Tribe,* the challenged ordinance seems to be important to the well-being of the Tribes and their members for both health and economic reasons.

The policy imperatives concerning judicial efficiency and tribal expertise would also be advanced in this case through exhaustion. As in *BN v. Crow Tribe,* the Tribes are "in the best position to develop the necessary factual record for disposition on the merits. Without that tribal record the federal district court . . . [faces] an action based on an uninterpreted tribal ordinance and an obscure factual background." *BN v. Crow Tribe,* 940 F.2d at 1246. Furthermore, exhaustion will provide the benefits of tribal explanations and expertise to the court in the event of further judicial review. *Id.*

Plaintiffs raise two arguments regarding the purposes of exhaustion which must be addressed. First, Plaintiffs maintain that this case involves only issues of federal law and that no tribal expertise is required. This argument, however, is unavailing for two reasons. First, though Plaintiffs contend that they are susceptible to Tribal regulatory authority, the initial question as to whether the Plaintiffs' proposed projects are within the scope of Ordinance 87A has not been answered. Certainly, the Shoreline Protection Office is best suited to make this determination in the first instance. Second, the fact that issues of federal law are involved does not

diminish the benefits of exhaustion. The growing expertise of tribal courts need not be limited solely to the interpretation of internal laws and regulations. To the contrary, the continuous exposure of tribal courts to jurisdictional questions involving issues of federal law increases the value of their explanations to subsequent reviewing courts. Though exhaustion provides benefits to later reviewing courts, it also benefits tribal courts by encouraging them "to explain to the parties the precise basis for accepting jurisdiction." *National Farmers Union*, 471 U.S. at 857.

The second point raised by Plaintiffs concerning the purposes of exhaustion is based on prior administrative actions taken by the Tribes pursuant to Ordinance 87A. Because the Ordinance has been in effect for several years and has already been interpreted by the Shoreline Protection Board as a grant of authority over all lands within the exterior boundaries of the Reservation regardless of ownership, Plaintiffs suggest that exhaustion is unnecessary, and that this previous interpretation distinguishes this case from *BN v. Crow Tribe*.

In *BN v. Crow Tribe*, the Circuit Court noted that the Crow Tribe had not had an occasion to interpret the ordinance in question before the suit was filed in federal court. In this case, Ordinance 87A has been interpreted previously but only by the Shoreline Protection Board. The scope of Ordinance 87A has not been previously considered by the Tribal Court. Because both administrative and judicial remedies must be exhausted before proceeding in federal court, Plaintiffs' argument concerning prior administrative interpretation is unavailing. *BN v. Crow Tribe*, 940 F.2d at 1247.

Based on the foregoing, the court finds that all three imperatives for exhaustion compel dismissing or staying federal proceedings in this case.

National Farmers Union Exceptions

In *National Farmers Union,* the Supreme Court enumerated three exceptions to the tribal exhaustion doctrine. Exhaustion is not required in situations where the assertion of tribal jurisdiction (1) "is motivated by a desire to harass or is conducted in bad faith," or (2) "where the action is patently violative of express jurisdictional prohibitions," or (3) "where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." *National Farmers Union,* 471 U.S. at 856, note 21. Plaintiffs argue that the latter two exceptions are applicable in this case.

Regarding the second exception, the court notes that Plaintiffs have expanded it to include actions which are patently violative *of the Constitution or* express jurisdictional prohibitions. By improperly adding the constitutional aspect to the exception, Plaintiffs attempt to engage the court in an analysis of their constitutional claims at the exhaustion stage. However, the court will not consider the merits of Plaintiffs' case at this stage of the proceedings.

As to the genuine exception, Plaintiffs cannot point to any action "patently violative of jurisdictional prohibitions." As was discussed above, this dispute is unquestionably a "reservation affair" and arises on the reservation. The Supreme Court has held that "tribal authority over the activities of nonIndians on reservation

lands is an important part of tribal sovereignty. (Citations omitted) Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *Iowa Mutual,* 480 U.S. at 18. Rather than patently violative of jurisdictional prohibitions, Tribal jurisdiction over Plaintiffs in this case "presumptively" lies with the Tribes pending a full examination of tribal sovereignty. Therefore, the second exception to the exhaustion requirement does not apply in this case.

Plaintiffs also contend that exhaustion would be futile because of a lack of an adequate opportunity to challenge the Tribal Court's jurisdiction. Plaintiffs' arguments in this regard include allegations that the Shoreline Protection Board and the Tribal Court have prejudged the issue, that they lack independence from the Tribal Council and the Tribal Legal Department, and that they are biased. However, arguments questioning the competency and neutrality of tribal courts have long been a mainstay in attacks on tribal jurisdiction by nonIndians and have been consistently rejected. *See, e.g. Iowa Mutual,* 480 U.S. 9 (1987); *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978). Therefore, the court finds that the third exception to the exhaustion requirement also does not apply in this case.

Presence of Federal Defendants

Finally, Plaintiffs argue that exhaustion of tribal remedies is impossible in this case because the Tribal Court lacks jurisdiction over the Federal Defendants. Plaintiffs contend they cannot comply with the exhaustion requirement because they cannot file the identical

case in Tribal Court. Plaintiffs, however, have misconstrued the exhaustion requirement.

An order dismissing this action until the exhaustion requirement has been fulfilled is not a remand of the case to Tribal Court. This court cannot compel Plaintiffs to seek relief in Tribal Court but can only act according to the clear directives that have been given it by the United States Supreme Court and the Ninth Circuit Court of Appeals. Pursuant to those directives as enunciated in *National Farmers Union* and its progeny, Plaintiffs can proceed no further with this case in federal court until tribal remedies have been exhausted.

Compliance with the exhaustion requirement, however, does not demand the impossible of Plaintiffs as they suggest. Plaintiffs are not required to file a case in Tribal Court which includes the Federal Defendants. Plaintiffs may seek such relief in Tribal Court as is possible under the law and, once that is accomplished, may seek further relief in this court.

The issues concerning the Federal Defendants in this case are the same basic issues underlying the rest of the action and could be presented in Tribal Court without the Federal Defendants. The exhaustion doctrine requires that a record be developed in tribal proceedings concerning the authority of the Tribal Council to promulgate and enforce Ordinance 87A. That issue is determinative of all of Plaintiffs' claims, including the correctness of the BIA's approval and subsequent funding of the Ordinance. Therefore, the necessary record could be developed in Tribal Court without the presence of the Federal Defendants.

CONCLUSION

Because this case arises on the Reservation, directly implicates Tribal governmental interests, and names Tribal officials as Defendants, it is a "reservation affair." Under such circumstances, tribal remedies must be exhausted prior to the exercise of federal jurisdiction unless the assertion of tribal jurisdiction falls within one of the *National Farmers Union* exceptions. *Crawford v. Genuine Parts*, 947 F.2d at 1408. As none of the exceptions apply in this case, the court must either dismiss the case or stay the proceedings pending exhaustion of tribal remedies. *Id.* at 1407. Therefore,

IT IS HEREBY ORDERED that Defendants' motions to dismiss for failure to exhaust tribal remedies are GRANTED. The case is DISMISSED without prejudice pending exhaustion of tribal remedies.

If Plaintiffs do not inform the court within sixty days of their intent to seek Tribal remedies, the court shall enter final judgment.

The clerk is directed forthwith to notify counsel of entry of this order.

Done and dated this 11th day of February, 1993.

/s/ Charles C. Lovell
CHARLES C. LOVELL
United States District Judge

UNITED STATES DISTRICT COURT

MISSOULA DIVISION DISTRICT OF MONTANA

ROSS MIDDLEMIST, WAYNE W. MAUGHAN, FLATHEAD JOINT BOARD OF CONTROL

V.

SECRETARY OF THE UNITED STATES DEPARTMENT OF INTERIOR, Manual Lujan, Jr., et al.,

JUDGMENT IN A CIVIL CASE

CASE NUMBER: CV 91-155-M-CCL

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendant's motions to dismiss for failure to exhaust tribal remedies having been granted, that plaintiff take nothing and the case is dismissed without prejudice pending exhaustion of tribal remedies.

March 11, 1993
Date

LOU ALEKSICH, JR.
Clerk

/s/ Barbara A. Fries
(By) Deputy Clerk

Jon Metropoulos
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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

* * *

ROSS MIDDLEMIST, WAYNE W. MAUGHAN, FLATHEAD JOINT BOARD OF CONTROL

Plaintiffs,

v.

SECRETARY OF THE UNITED STATES DEPARTMENT OF INTERIOR, Manuel Lujan Jr.; DIRECTOR OF THE BUREAU OF INDIAN AFFAIRS, PORTLAND AREA, Stanley M. Speaks; SUPERINTENDENT OF THE BIA FLATHEAD AGENCY, Ernest Moran, in their official capacities; MEMBERS OF THE TRIBAL COUNCIL OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, Michael Pablo, Chairman, Sonny Morigeau, Secretary Treasurer, Joseph Felsman, Louie Adams, Hank Baylor, Tony Incashola,

Cause No. CV-91-155-M-CCL

COMPLAINT

(Filed NOV 6 1991)

John Lozeau, Lloyd Irvine, Patrick Lefthand, Laurence Kenmille; DIRECTOR OF THE DEPARTMENT OF NATURAL RESOURCES OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, Rhonda R. Swaney; ADMINISTRATOR OF THE SHORELINE PROTECTION OFFICE OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, J. Lloyd Jackson; MEMBERS OF THE SHORELINE PROTECTION BOARD OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, Joseph Snyder, Jim Mercer, Al Hewankorn, Donald Lucas, Thurman Trosper, Joseph Felsman,

Defendants.

INTRODUCTION

1. In this action, the Plaintiffs seek relief from the imposition of power by the government of the Confederated Salish and Kootenai Tribes in excess of its jurisdiction and in violation of the Plaintiffs' constitutional rights; and from the unconstitutional and illegal support and approval of such violations by officers and employees of the United States. The Plaintiffs are not tribal members. They have no right to vote in tribal elections, hold tribal office, sit on juries in tribal court, or act as a tribal judge. The U.S. Constitution guarantees Plaintiffs these and other rights, including full and equal participation in the government that regulates their activities and in the courts that enforce the laws under which

they live. The individual Plaintiffs own land in fee within the Flathead Reservation, and with the Joint Board of Control they wish to undertake work on that land. Tribal government asserts it has jurisdiction to regulate that work pursuant to tribal Ordinance 87A. The assertion of jurisdiction by the tribal government over these Plaintiffs and the approval and support of this illegal assertion by federal officers and employees violates the Plaintiffs' constitutional rights. Moreover, the assertion of authority by the tribal government over these Plaintiffs exceeds its jurisdiction and is, therefore, illegal and illegitimate.

JURISDICTION

2. This is a civil action for declaratory, injunctive and mandatory relief arising under the Constitution of the United States and the Treaty of Hellgate, entered July 16, 1855 by the United States and representatives of the tribes which now comprise the Confederated Salish and Kootenai Tribes. This Court has jurisdiction pursuant to 28 USC § 1331 and 28 USC § 1361. This court has authority to review the federal administrative actions at issue pursuant to 5 USC § 702. It has authority to grant the requested declaratory, injunctive and mandatory relief pursuant to 28 USC § 2201 and 5 USC § 706.

VENUE

3. Venue is appropriate in the United States District Court of Montana, Missoula Division, pursuant to 28 U.S.C. § 1391(b).

PARTIES

4. Plaintiff Ross Middlemist is a rancher who owns 110 acres in fee in Sanders County, Montana and situated within the exterior boundaries of the Flathead Indian Reservation. He is not a member of the Confederated Salish and Kootenai Tribes (hereinafter "Tribes" or "CSKT.")

5. Plaintiff Middlemist is an irrigator served by the Flathead Irrigation and Power Project (hereinafter "FIPP"), and he is a constituent of the Joint Board of Control. Mr. Middlemist is also a Commissioner for the Jocko Irrigation District and a member of the Joint Board of Control.

6. Plaintiff Wayne W. Maughan is a farmer who owns 280 acres in fee in Lake County, Montana and situated within the exterior boundaries of the Flathead Indian Reservation. He is not a member of the Tribes.

7. Plaintiff Maughan is a constituent of the Joint Board of Control.

8. Plaintiff Flathead Joint Board of Control (hereinafter "JBC" or "Joint Board") is comprised of elected representatives of three Irrigation Districts, the Flathead, Mission, and Jocko Valley, served by the FIPP. The JBC was created pursuant to § 85-7-1601, Mont. Code Ann., et seq. Pursuant to § 85-7-1612, Mont. Code Ann., the JBC has the authority and power, *inter alia*, to institute and maintain any and all actions, including suits at law or in equity, to enforce, maintain, protect, or preserve any and all rights, privileges and immunities enjoyed by the Irrigation Districts and their respective members.

9. The federal Defendants are the Secretary of the United States Department of Interior, the Portland Area Director of the Bureau of Indian Affairs, and the Superintendent of the BIA Flathead Agency. These Defendants, or their predecessors, reviewed and approved tribal Ordinance 87A, or had the responsibility to do so, and continue to lend or facilitate financial and technical assistance for its implementation and enforcement. Hereafter, when mentioned separately from the remaining Defendants, these Defendants are denominated the "federal government Defendants".

10. The remaining Defendants are elected or appointed officials of tribal government or employees of tribal government responsible for adopting, implementing and enforcing tribal Ordinance 87A. Specifically, the elected officials are members of the Tribal Council of the CSKT, which adopted tribal Ordinance 87A. The named tribal government employees or appointees are members of the tribal Shoreline Protection Board, the administrator of the Shoreline Protection Office of the CSKT, and the Director of the tribal Department of Natural Resources, all of whom are charged with implementing and enforcing the Ordinance. Hereafter, when mentioned separately from the federal government Defendants, these Defendants are denominated the "tribal government Defendants".

FACTS

Ross Middlemist

11. Plaintiff Ross Middlemist represents the third generation in his family to farm and ranch on the

Flathead Reservation. He purchased the particular real property where the activities in question are to occur in 1974. The property is homesteaded land in the Dixon Bench area and it is included within the Jocko Irrigation District. It is in Sec. 13 and 14, T. 18 N., R. 22 W.

12. A small natural spring arises from the ground on the property, which Mr. Middlemist holds in fee. This spring runs for approximately 100 yards and disappears into the ground on Mr. Middlemist's property. Mr. Middlemist uses this spring water to supply a stockwater tank. This stockwater tank has become worn over the years and is in need of refurbishing or replacement.

13. Mr. Middlemist planned to improve the site and replace or refurbish the stockwater tank this fall. On September 17, 1991 he went to the Agricultural Stabilization Conservation Service ("ASCS") for Sanders County in Plains, Montana, to ask about financial assistance for this project. After an inspection by a Soil Conservation Service ("SCS") employee, he was told the project would likely qualify for funding.

14. On September 28, 1991 Mr. Middlemist received a letter from the ASCS which stated the project had been approved for funding in the amount of $1,000.00.

15. On October 8 and 9, Mr. Middlemist was informed by the SCS and the ASCS that, in addition to applying for permits for the project from the Army Corp of Engineers and the Montana Department of Fish, Wildlife and Parks, he would have to apply for a permit from the tribal Shoreline Protection Office pursuant to the provisions of tribal Ordinance 87A.

16. Mr. Middlemist stated that while he would apply for all applicable permits, he did not believe tribal Ordinance 87A was legally applicable to him. He was then informed by the ASCS this might impede approval of the project for funding.

17. On October 24, 1991, Mr. Middlemist was informed the ASCS would not provide funding for the project unless he obtained a tribal permit pursuant to Ordinance 87A. He was told the $1,000.00 funding would remain available to him for 30 days, allowing him to decide whether or not to apply for a tribal 87A permit.

18. Mr. Middlemist has not applied for a permit from the tribal Shoreline Protection Office.

19. Mr. Middlemist has done no construction on the project.

Wayne W. Maughan and Joint Board of Control

20. Plaintiff Wayne Maughan holds fee simple title to real property located in the NW 1/4 of Sec. 16, T. 20 N., R. 21 W., which is included within the Mission Irrigation District. He is a second-generation farmer in the area. His family first acquired the property in question by purchase from the State of Montana through a school section sale.

21. Mr. Maughan is an irrigator served by FIPP and represented by the Joint Board of Control.

22. Mr. Maughan has an impoundment reservoir on his property which is fed by a perennial stream, Maughan Creek, and which, along with the creek, drains farmland situated at higher elevations. The stream runs in a generally east-to-west direction.

23. The dam on Mr. Maughan's property requires improvement for safety and water quality reasons and to expand the capacity of the reservoir.

24. Improvement of this dam will improve the quality of water flowing downstream by allowing greater storage and settling of runoff and irrigation return flows; and by allowing reuse of irrigation water. Additionally, by capturing more runoff and irrigation return flows and the reuse of that water, it will make more water available for upstream irrigators by requiring less water to be delivered to Mr. Maughan.

25. To facilitate this project, the Joint Board passed a resolution on November 13, 1990, numbered Resolution No. 90-04, and set aside a grant of $3,000.00 to help pay for the project.

26. This project will benefit the Joint Board and its constituents by improving water quality and the efficiency of water use and by enhancing irrigation capabilities and opportunities.

27. This project is part of a demonstration program for projects providing both water quality and irrigation benefits. Similar projects are anticipated on the lands of Joint Board constituents, including non-member-owned fee lands, to enhance irrigation opportunities, promote the efficient use of water, and improve water quality.

28. The Joint Board retained an engineering firm to inspect the dam and design and draft plans for its improvement. In the course of that work, the engineer

inspected the dam and consulted on the plans for improving the dam with the Montana State Department of Natural Resources and Conservation ("DNRC"), Dam Safety Section. The DNRC determined the dam is not a high-hazard dam and therefore the Joint Board and Mr. Maughan need not obtain either a construction or operating permit from DNRC.

29. Mr. Maughan and the Joint Board then began the process of applying for the requisite state, federal and local government permits and approvals. Specifically, the Joint Board and Mr. Maughan have begun the process of applying for or intend to apply for, when appropriate, the following permits:

(i) a "404 permit" from the Army Corps of Engineers;

(ii) a Montana Pollutant Discharge Elimination System ("MPDES") permit from the state Water Quality Bureau of the Department of Health and Environmental Sciences ("DHES");

(iii) a "124" Stream Preservation Act permit from Montana State Department of Fish, Wildlife & Parks;

(iv) a "310", Natural Streambed and Land Preservation Act permit from the Lake County Soil Conservation District;

(v) a "3A" permit related to a short-term turbidity variance during construction, from the DHES;

(vi) a flood plain development permit from the DNRC.

30. The Army Corp of Engineers informed the Joint Board of Control the tribal Shoreline Protection Office, pursuant to tribal Ordinance 87A, would have to review the project.

31. Neither the Joint Board nor Mr. Maughan have applied for a permit from the tribal Shoreline Protection Office.

32. Neither the Joint Board nor Mr. Maughan have done any construction on the project.

Tribal Ordinance 87A

33. The Aquatic Lands Conservation Ordinance ("ALCO"), designated tribal Ordinance No. 87A, was adopted by the Tribal Council on December 13, 1985. By its terms, it became effective upon the promulgation of implementing regulations by the Tribal Council on December 5, 1986.

34. By its terms, Ordinance 87A purportedly applies throughout the Flathead Indian Reservation regardless of whether the person who intends to engage in a project within the definition of ALCO is a tribal member or not, or whether or not the project is to be carried out on land owned in fee by a nonmember.

35. The federal government defendants or their agents or employees, or some of them, provided technical and financial assistance to the tribal government defendants for the development of Ordinance 87A.

36. The federal government defendants or their agents or employees, or some of them, provide technical

and financial assistance to tribal government for the implementation and enforcement of Ordinance 87A.

37. The Secretary of the Interior, or a subordinate to whom he delegated the authority, approved Ordinance 87A.

38. The Shoreline Protection Office ("SPO"), which administers and enforces Ordinance 87A, is part of tribal government. It is an office within the tribal government's Department of Natural Resources.

39. J. Lloyd Jackson is the administrator of the SPO.

40. Rhonda R. Swaney is the Director of the Department of Natural Resources.

41. The SPO has advertised by radio and newspaper that Ordinance 87A is applicable throughout the reservation and anyone planning to do any work on or near natural streams, perennial and intermittent, rivers, lakes, or wetlands within the Reservation must adhere to its provisions.

42. Ordinance 87A requires any person who intends to undertake work on or near natural streams, perennial and intermittent, rivers, lakes, or wetlands within the Reservation to present a written application to the SPO prior to doing any work on the project.

43. Ordinance 87A requires any person who intends to undertake work on or near natural streams, perennial and intermittent, rivers, lakes, or wetlands within the Reservation to present a written application to the SPO for a determination of whether or not the planned project falls within the scope of its provisions.

44. Ordinance 87A requires each applicant to pay a nonrefundable fee.

45. Tribal government, through the SPO and the Shoreline Protection Board, enforces Ordinance 87A and would enforce its provisions against the Plaintiffs if they proceed with their projects without following the requirements of Ordinance 87A.

46. Ordinance 87A provides that any person engaging in a project without a valid 87A permit shall be subject to proceedings in tribal court for abatement and a penalty of up to $500.00 for each day the project is deemed in violation. The tribal court, pursuant to 87A, may also order a violator "to restore at his own expense the damaged lands and waters. . . . "

The Flathead Reservation

47. The Treaty of Hellgate signed July 16, 1855 by representatives of the United States and the Flathead Nation, the Upper Pend d'Oreilles, and the Kootenais provided for the reservation to these Indian Tribes of the land now within the exterior boundaries of the Flathead Indian Reservation.

48. The Reservation encompasses approximately 1.2 million acres of land in northwest Montana. Approximately 50% of the Reservation area is owned by individuals in fee. Of this amount, the majority is owned by individuals who are not members of the CSKT.

49. Of the remaining Reservation acreage, the federal government owns approximately 22,000 acres; and the State of Montana owns approximately 30,000 acres.

50. The remainder of the Reservation is either held in trust by the United States for the Tribes or individual tribal members or owned by the Tribes.

51. The majority of tribal and trust lands is situated along the periphery of the Reservation and along the Flathead River corridor. The valleys of the Reservation are largely owned in fee by nonmembers of the Tribes.

52. Article two of the Treaty of Hellgate provided that the Reservation was to be "for the use and occupation" of the Tribes "and as a general Indian reservation . . . " Article two also provided the reservation was to be "for the exclusive use and benefit" of the Tribes, and that no "white man, excepting those in the employment of the Indian Department (shall) be permitted to reside upon the said reservation without permission of the confederated tribes, and the superintendent and agent."

53. Article six provided that the President may in his discretion cause the whole or a portion of the reservation to be surveyed and allotted to individuals or families of the Tribes, citing as providing the terms and regulations for the location of individuals or families on allotments the sixth article of the treaty with the Omahas.

54. In Article eight of the Treaty, the Tribes acknowledged "their dependence upon the Government of the United States. . . . "

55. Congress enacted the General Allotment Act, 24 Stat. 388, as amended, 25 USC §§ 331 et seq., in 1887, the policy of which was to effect the gradual assimilation of

the Indian population and the gradual extinction of Indian reservations and Indian titles.

56. Toward this end, Congress provided in the General Allotment Act for the allotment of reservation lands to tribal members, the eventual removal of restrictions on alienation of such allotments, and the opening of unallotted reservation lands to non-members for settlement.

57. Pursuant to this policy, Congress, by the Act of April 23, 1904 (33 Stat. 302), provided for the survey and allotment of the Flathead Reservation to persons having tribal rights and the subsequent disposal of unallotted lands to nonmembers pursuant to the requirements of the Act.

58. Pursuant to these Acts of Congress and Presidential Proclamations issued under their provisions and through alienation of lands allotted to tribal members, nonmembers of the Tribes have come to own the majority of fee land on the Reservation.

59. The Reservation forms a portion of three counties, those being Missoula County, Sanders County, and Lake County.

60. The entire Reservation population according to the latest U.S. census figures is 21,259. Of this amount, 3,000, or 14% are tribal members. Thus, 86% of the Reservation population is comprised of nonmembers of the Tribes.

61. Nonmembers are excluded from entering certain areas of the Reservation by tribal government.

62. Federal, state, and local governmental agencies exercise regulatory jurisdiction over various activities

and occurrences on the Reservation, including the activities in question here which the Plaintiffs wish to undertake.

63. Tribal government exercises the inherent sovereign power of the Tribes and it is not a local government deriving its authority from the sovereignty of the state or federal governments.

64. Non-members are excluded from receiving or utilizing certain services provided by tribal government.

65. In its governmental capacity, the federal government cannot exclude any nonmember from entering the Reservation.

66. In its governmental capacity, the federal government cannot exclude Plaintiffs Middlemist and Maughan from access to their property, nor can they condition such access.

67. In its governmental capacity, the federal government can neither prohibit nor condition the activities of the Joint Board.

68. In its governmental capacity, the tribal government cannot exclude any nonmember from entering the Reservation.

69. In its governmental capacity, the tribal government cannot exclude Plaintiffs Middlemist and Maughan from access to their property, nor can they condition such access.

70. In its governmental capacity, the tribal government can neither prohibit nor condition the activities of the Joint Board.

71. Nonmembers may not serve on juries in tribal court, hold elective office within tribal government, serve as a tribal judge, or vote in tribal government elections.

72. The U.S. Constitution guarantees citizens the fundamental right to vote for and have an equal voice in the election of the government under which they live. The U.S. Constitution guarantees citizens the fundamental right to run for and hold elective office in the government under which they live. The U.S. Constitution guarantees citizens the right to a jury trial by their peers in civil cases where the common law provides such right. The U.S. Constitution guarantees citizens an equal right to serve as jurors in civil cases. The U.S. Constitution requires the United States to guarantee to each state a republican form of government, the benefits of which inure to the citizens of the states. The U.S. Constitution guarantees the Plaintiffs these and other rights notwithstanding their residence within the exterior boundaries of the Flathead Reservation.

Count One

73. The Plaintiffs hereby incorporate all allegations in the preceding paragraphs of this Complaint.

74. The assertion of authority by the tribal government Defendants pursuant to tribal Ordinance 87A over the activities of the Plaintiffs on lands owned in fee by nonmembers exceeds the scope of tribal sovereignty and therefore tribal government jurisdiction as it is inconsistent with the Tribes' status as a dependent sovereign incorporated within the United States and subject, in its external relations, to the Constitution.

75. The exercise of tribal government power in this matter pursuant to Ordinance 87A injures the Plaintiffs by violating their rights under the Constitution, as it requires Plaintiffs to seek permits for activities to be conducted on nonmember fee-owned land from a government in which they do not have a right to full and equal participation. It further injures the Plaintiffs by requiring them to pay a nonrefundable fee to a government without jurisdiction over them; and in the case of Mr. Middlemist it has caused the loss of funding for his project.

Count Two

76. The Plaintiffs hereby incorporate all allegations in the preceding paragraphs of this Complaint.

77. The assertion of authority by the tribal government Defendants pursuant to Ordinance 87A over the activity of the Plaintiffs on lands owned in fee by nonmembers exceeds the scope of tribal sovereignty and therefore tribal government jurisdiction as it is inimical to the overriding federal interest and obligation to provide, guarantee and ensure a republican form of government.

78. The exercise of tribal government power pursuant to Ordinance 87A injures the Plaintiffs by depriving them of their right to live under a republican form of government as guaranteed by the Constitution.

Count Three

79. The Plaintiffs hereby incorporate all allegations in the preceding paragraphs of this Complaint.

80. The assertion of authority by the tribal government defendants pursuant to Ordinance 87A over the activities of the Plaintiffs on lands owned in fee by nonmembers exceeds the scope of their sovereignty and therefore their jurisdiction as it is inimical to the overriding federal interest and obligation to provide and safeguard civil liberties and rights guaranteed by the Constitution of the United States.

81. The exercise of tribal government power in this matter pursuant to Ordinance 87A injures the Plaintiffs by violating their rights under the Constitution, as it requires Plaintiffs to seek permits for activities to be conducted on nonmember fee-owned land from a government in which they do not have a right to full and equal participation. It further injures the Plaintiffs by requiring them to pay a nonrefundable fee to a government without jurisdiction over them; and in the case of Mr. Middlemist it has caused the loss of funding for his project.

Count Four

82. The Plaintiffs hereby incorporate all allegations in the preceding paragraphs of this Complaint.

83. The Reservation areas in which the Plaintiffs have planned projects on aquatic lands are self-contained, definable areas in which non-tribal fee lands predominate. Tribal government has no significant interest in controlling these activities, and the Tribes therefore lack jurisdiction to apply and enforce Ordinance 87A.

84. The exercise of tribal government power in this matter pursuant to Ordinance 87A injures the Plaintiffs

by violating their rights under the Constitution, as it requires Plaintiffs to seek permits for activities to be conducted on nonmember fee-owned land from a government in which they do not have a right to full and equal participation. It further injures the Plaintiffs by requiring them to pay a nonrefundable fee to a government without jurisdiction over them; and in the case of Mr. Middlemist it has caused the loss of funding for his project.

Count Five

85. The Plaintiffs hereby incorporate all allegations in the preceding paragraphs of this Complaint.

86. The Secretary of Interior and his agents have the duty to refrain from acts violating the Constitution and the rights it secures to all citizens. The Secretary of Interior and his agents have the duty, when it is within their legal powers, to prohibit, prevent, and rectify violations by the tribal government of the Constitution and the rights secured to all citizens.

87. The Secretary of Interior and his agents, having approved and reviewed and failed to disapprove or modify tribal Ordinance 87A, aided, abetted, encouraged and failed to prohibit or restrain the violation by the tribal government of constitutional rights of the Plaintiffs. By approving Ordinance 87A, the Secretary of the Interior and his agents acted illegally, unconstitutionally and, therefore, beyond the scope of their powers, since their actions approved an ordinance violative of the Plaintiffs' constitutional rights.

Count Six

88. The Plaintiffs hereby incorporate all allegations in the preceding paragraphs of this Complaint.

89. The federal government, through the Department of Interior, Bureau of Indian Affairs, provides funding and technical assistance used in the implementation and enforcement of Ordinance 87A. The federal government, through the Department of Interior, Bureau of Indian Affairs, provided funding and technical assistance used in the development of Ordinance 87A.

90. By providing funding and technical assistance for the development, implementation and enforcement of Ordinance 87A, the Secretary of Interior and his agents acted and continue to act unconstitutionally and illegally and, therefore, beyond the scope of their powers, since their actions supported and continue to support an Ordinance violative of the Plaintiffs' constitutional rights.

RELIEF REQUESTED

WHEREFORE, the Plaintiffs respectfully request this court to grant the following relief:

1. A declaratory judgment that tribal government lacks the jurisdiction to apply and enforce the provisions of tribal Ordinance 87A against the Plaintiffs.

2. A permanent injunction enjoining the tribal government defendants from applying or attempting to apply or enforce tribal Ordinance 87A against the Plaintiffs.

3. Upon motion of the Plaintiffs and after hearing set by the court, a preliminary injunction, restraining the tribal government defendants from applying or attempting to apply or enforce tribal Ordinance 87A against the Plaintiffs until this matter can be fully litigated.

4. Relief in the nature of mandamus requiring the federal government defendants to disapprove tribal Ordinance 87A insofar as it purports to apply to nonmember activity on nonmember-owned land.

5. Relief in the nature of mandamus requiring the federal government defendants to withdraw technical and financial assistance for the implementation of tribal Ordinance 87A insofar as that technical and financial assistance supports, aids and encourages the imposition of tribal government power beyond its jurisdiction and in violation of the Plaintiffs' Constitutional rights.

6. Such other relief as the court deems just and proper.

DATED this 6th day of November, 1991.

BROWNING, KALECZYC, BERRY & HOVEN, P.C.

By: Jon Metropoulos
Jon Metropoulos
139 North Last Chance Gulch
P. O. Box 1697
Helena, Montana 59624-1697
(406) 449-6220
Attorneys for Plaintiffs

Ordinance No. 87-A

AQUATIC LANDS CONSERVATION ORDINANCE

BE IT ENACTED BY THE COUNCIL OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES that:

PART I

SHORT TITLE, AUTHORITY

Section 1. Short Title

This Ordinance may be referred to as the Aquatic Lands Conservation Ordinance or "ALCO".

Section 2. Authority.

This Ordinance is enacted pursuant to the Constitution of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Article VI, Section 1, Subsections (a), (l), (n), (t) and (u), approved by the Secretary of the Interior, October 28, 1935.

* * *

PART IV

PERMITS

Section 1. Permit Required

a. No work may commence on a project until the responsible person has been issued a permit for the project.

b. All work on a project shall be conducted pursuant to the terms and conditions of the project permit.

c. A permit shall be prominently displayed at the project site for the duration of construction activities and for two weeks thereafter.

* * *

Section 3. Application for Permit.

a. Any person who intends to undertake a project shall present a written application for the project to the Office.

* * *

PART VI

ENFORCEMENT

Section 1. Inspection.

The Administrator or his duly authorized agen~~y~~[t (as handwritten in original)] may inspect any project for the purpose of determining compliance with this Ordinance, its implementing regulations, or permit terms and conditions.

Section 2. Projects in Non-compliance.

a. Except for emergency actions, a project engaged in by any person without a valid permit or in non-compliance with the terms of a valid permit shall be subject to proceedings brought by the Administrator for immediate abatement of a public nuisance.

b. Upon a finding that a non-complying project constitutes a public nuisance, the Tribal Court may penalize the responsible person in an amount not less than twenty five (25) dollars or more than five hundred (500) dollars

for each day that the responsible person continues to engage in or maintains a nonconforming project at, in, or on aquatic lands.

c. In addition to any financial penalty imposed, the responsible person may be ordered by the Court to restore at his own expense the damaged lands and waters within such time as the Court may deem reasonable.

* * *

CERTIFICATION

The foregoing ordinance was adopted by the Tribal Council on December 13, 1985, with a vote of 9 for, 0 opposed, and 0 not voting, pursuant to the authority vested in it by Article VI, Sections 1(a), (l), (n), (t) and (u) of the Tribes Constitution and Bylaws; said Constitution adopted and approved under Section 16 of the Act of June 18, 1934, (48 Stat. 984), as amended.

/s/ James H. Steele
Vice-Chairman,
Tribal Council

ATTEST:

/s/ Illegible
Executive Secretary

APPROVAL:

_____
Title_____
Bureau of Indian Affairs

Date:_____

APPROVED:
/s/ Donovan R. Boldt
SUPERINTENDENT
Received Office of
Superintendent

Dated DEC 16 1985

FINAL REGULATIONS FOR THE AQUATIC LANDS CONSERVATION ORDINANCE OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES

(December 5, 1986)

* * *

Section 1.1 Authority.

These regulations are adopted under authority of Ordinance 87A of the Confederated Salish and Kootenai Tribes, the Aquatic Lands Conservation Ordinance.

* * *

PART V

ENFORCEMENT

Section 5.1 Violations.

The following actions shall constitute an act of non-compliance with these regulations and Ordinance 87A:

(1) commencement or initiation of a project without the responsible person first obtaining a permit; or

(2) continuation of work on an unpermitted project by any person; or

(3) failure to comply with the terms or conditions of a permit; or

(4) failure to comply with the terms and conditions of Ordinance 87A and these regulations; or

(5) failure to comply with orders of the Board.

* * *

Section 5.5 Penalties.

Upon a finding that the person served with a Notice of Non-Compliance has committed a violation of Ordinance 87A, these regulations, a condition of a permit, or an order of the Board, any or all of the following penalties may be assessed and ordered:

(1) revocation of an applicable permit;

(2) removal of the project and restoration of the underlying property;

(3) imposition of a monetary fine;

(4) prescription of remedial measures.

Section 5.6 Actions to Enforce.

The Administrator may institute in Tribal Court, under the procedures there applicable, a civil action to collect against any person who has been ordered to pay a penalty or perform remedial measures pursuant to these regulations and who has not appealed such decision or who has not paid an assessed fee, costs, or penalty.

Section 5.7 Revocation of Permit and Restoration of Permit Area.

(a) In addition to revocation of a permit the responsible person may be ordered to remove a project and to restore the area surrounding and underlying the project.

(b) Removal of a project and restoration of the surrounding area must be accomplished within sixty (60) days of of [sic] an order directing such action, except that the Board or Court may, on its own initiative, or upon

application of the responsible person, delay the removal and restoration for up to twelve months if it is determined that such delay would reduce the likelihood of environmental damage resulting from such removal and restoration.

Section 5.8 Failure to Comply With an Order to Remove.

(a) In the event that a person responsible for a project fails to comply with an order directing removal and restoration, the Board, after the lapse of a sixty-day grace period, may undertake the removal of the project and restoration of the underlying property on its own initiative, and may assess the responsible person for the costs of such work.

(b) The Administrator must notify the responsible person by mail at least five (5) days in advance of the planned enforcement action that it plans to remove the project and perform any necessary restoration.

Section 5.9 Fines.

(a) Any person responsible for a project constructed or maintained contrary to the provisions of Ordinance 87A, these regulations, or the terms of a permit shall be subject to a penalty of not less than twenty-five dollars ($25) or more than five hundred dollars ($500) for each act of non-compliance.

(b) Each day during which an act of non-compliance shall continue shall be considered a separate violation of these regulations and of Ordinance 87A.

(c) Nothing in these regulations will be interpreted to deny the use of other civil remedies available under Tribal or federal law.

* * *

The Confederated Salish and Kootenai Tribes
of the Flathead Reservation

SHORELINE PROTECTION OFFICE

Box 278
Pablo, Montana 59855
(406)675-2700
Ext. 368

Conf S+K Tribes
5/4-12/31/89
#210

NOTICE

Private individuals; Corporations, Local, County, State, Tribal and Federal Government Agencies who are going to be doing any type of construction work on or near any natural streams, rivers, lakes, or wetlands within the Flathead Reservation **must submit an application and obtain an approved permit before any disturbance of the bed and banks of these waterways occurs.**

This regulation is in accordance with Tribal Ordinances 87A, the Aquatic Lands Conservation Ordinance and 64A (revised), the Shoreline Protection Ordinance.

These ordinances represent the effort of the Confederated Salish & Kootenai Tribes to maintain the vital link between land and water for present and future generations. The economic well-being and quality of life for everyone living on the Flathead Reservation is largely dependent upon the reservations' wealth of natural resources and how they are managed.

Applications may be acquired by calling (406) 675-2700, extension 368, or by picking one up at the Shoreline Protection Office in the Tribal Complex at Pablo.

Reservation Waters Need Your PLEASE Keep Them Clean

PLAINTIFF'S EXHIBIT
D

BEST AVAILABLE COPY

UNITED STATES CONSTITUTION

ARTICLE IV

Section 2. [1] The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

* * *

Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment XV

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

TREATY WITH THE FLATHEADS, ETC., 1855.

July 16, 1855. *Articles of agreement and convention made and concluded at the treaty-ground at Hell Gate, in the Bitter Root Valley, this sixteenth day of July, in the year one thousand eight hundred and fifty-five, by and between Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the undersigned chiefs, head-men, and delegates of the confederated tribes of the Flathead, Kootenay, and Upper Pend d'Oreilles Indians, on behalf of and acting for said confederated tribes, and being duly authorized thereto by them.*

* * *

ARTICLE 2. There is, however, reserved from the lands above ceded, for the use and occupation of the said confederated tribes, and as a general Indian reservation, upon which may be placed other friendly tribes and bands of Indians of the Territory of Washington who may agree to be consolidated with the tribes parties to this treaty, under the common designation of the Flathead Nation, with Victor, head chief of the Flathead tribe, as the head chief of the nation, the tract of land included within the following boundaries, to wit:

* * *

All which tract shall be set apart, and, so far as necessary, surveyed and marked out for the exclusive use and benefit of said confederated tribes as an Indian reservation. Nor shall any white man, excepting those in the employment of the Indian department, be permitted to

reside upon the said reservation without permission of the confederated tribes, and the superintendent and agent.

* * *

AN ACT For the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation, in the State of Montana, and the sale and disposal of all surplus lands after allotment.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, directed to immediately cause to be surveyed all of the Flathead Indian Reservation, situated within the State of Montana, the same being particularly described and set forth in article two of a certain treaty entered into by and between Isaac H. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the chiefs, headmen, and delegates of the confederated tribes of the Flathead, Kootenai, and Upper Pend d'Oreille Indians, on the sixteenth day of July, eighteen hundred and fifty-five.

SEC. 2. That so soon as all of the lands embraced within said Flathead Indian Reservation shall have been surveyed, the Commissioner of Indian Affairs shall cause allotments of the same to be made to all persons having tribal rights with said confederated tribes of Flatheads, Kootenais. Upper Pend d'Oreille, and such other Indians and persons holding tribal relations as may rightfully belong on said Flathead Indian Reservation, including the Lower Pend d'Oreille or Kalispel Indians now on the reservation, under the provisions of the allotment laws of the United States.

* * *

SEC. 8. That when said commission shall have completed the classification and appraisement of all of said

lands and the same shall have been approved by the Secretary of the Interior, the land shall be disposed of under the general provisions of the homestead, mineral, and town-site laws of the United States, except such of said lands as shall have been classified as timber lands, and excepting sections sixteen and thirty-six of each township, which are hereby granted to the State of Montana for school purposes. And in case either of said sections or parts thereof is lost to the said State of Montana by reason of allotments thereof to any Indian or Indians now holding the same, or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized, in the tract under consideration, to locate other lands not occupied, not exceeding two sections in any one township, and such selections shall be made prior to the opening of such lands to settlement: *Provided,* That the United States shall pay to said Indians for the lands in said sections sixteen and thirty-six, or the lands selected in lieu thereof, the sum of one dollar and twenty-five cents per acre.

SEC. 9. That said lands shall be opened to settlement and entry by proclamation of the President. . . .

* * *

28 USCS § 2201. Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, [26 USCS § 7428] a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of Canadian merchandise, as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

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28 USCS § 2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

(June 25, 1948, ch 646, § 1, 62 Stat. 964.)